COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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SHOPPING FOR SOCIAL SECURITY LAW IN THE EU

NICOLAS RENNUY*

Abstract

This article explores the extent to which EU law does and should enable undertakings to control which Member State's contribution rate applies to them. By relying on posted workers, for example, undertakings can "shop" for the cheapest social security law, lowering their labour costs; this is, however, to the detriment of workers, competitors, and social security systems. The article seeks to determine when conflict rules excessively facilitate law shopping. It then discusses how legislators and courts can complicate law shopping by framing it as abuse, redesigning rules, interpreting them teleologically, and improving their enforcement.

1. Introduction

That "[f]irms can and do 'regime shop' for the lowest percentage of social security contributions"[1] is vividly illustrated by a recent judgment of the Grand Chamber of the ECJ.[2] AFMB is a Cypriot company offering transport undertakings savings to the tune of 25 percent of their staff costs. It hired international long-distance lorry drivers crisscrossing Europe and made them fully available to a number of Dutch transport undertakings, by whom those same drivers used to be employed directly. While the drivers' work routine was largely or wholly unaffected, their legal position changed significantly: they shifted from Dutch to Cypriot social security law because their employer was no longer in the Netherlands, but in Cyprus. This operation lowered labour costs, given the difference between the Dutch and Cypriot social security contribution rates. It was not a one-off experiment. Rather, this type of construction is part of the core business of AFMB, which it advertised on its website even after the ECJ negated the attempt to choose Cypriot law by

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1. Cremers, "Market integration, cross-border recruitment, and enforcement of labour standards – A Dutch case" in Arnholtz and Lillie (Eds.), *Posted Work in the European Union: The Political Economy of Free Movement* (Routledge, 2020), p. 140.

2. Case C-610/18, *AFMB* v. *Raad van bestuur van de Sociale verzekeringsbank*, EU:C:2020:565.

finding that the Dutch transport undertakings remained the actual employers of the drivers.

Whether Dutch or Cypriot social security law applies has a profound impact on various actors. It determines the contribution burden of the undertakings involved, and therefore their competitive position *vis-à-vis* their competitors. The stakes can be high, considering that the social security contribution rates for employers vary widely between Member States. On average, the nine Member States with the highest rate levy 23 percent of gross wages from employers; the nine Member States with the lowest rate only 8 percent.[3] The applicable law also defines the rights (i.e. benefits) and obligations (e.g. contributions) of workers. AFMB attempted to subject drivers to the social security system of Cyprus, where they had never worked or lived, and to bar them from the more protective social security schemes of the Netherlands, where they resided. Finally, the question of which law applies affects the expenditure and revenue of both the chosen Member State, Cyprus, and the circumvented Member State, the Netherlands.

This article addresses three questions that such scenarios raise. First, to what extent can undertakings control the applicable social security law? Employer and employee cannot contractually agree that the law of one particular State will apply – there is no *direct* choice of law. Instead, Regulation 883/2004 identifies the applicable social security law exclusively on the basis of objective connecting factors, such as the place of work or the place of the employer's registered office.[4] By exercising free movement rights, workers and businesses can relocate the connecting factor and thus change the applicable law. *AFMB* demonstrates that this can be intentional. More often, regulatory mobility is an incidental effect of, rather than a motive for, physical mobility. The article begins with a first analysis of the extent to which the main conflict rules of Regulation 883/2004 enable an *indirect* choice of law.[5] The *lex loci laboris* (section 2) is much less conducive to law shopping than its alternatives, the posting rule (section 3) and the rule for those who normally work in two or more States (section 4).

Second, when is such private control over public law problematic? On the one hand, the free movement rights that, when exercised, influence the applicable law are fundamental to the European legal order, and there are good

3. 2019 figures for a single person earning 67% of the average gross wage, available at <europa.eu/economy_finance/db_indicators/tab/#> (all websites last visited 2 Dec. 2020).

4. Title II of Regulation 883/2004 on the coordination of social security systems, O.J. 2004, L 166/1; Case C-345/09, *van Delft* v. *College voor zorgverzekeringen*, EU:C:2010:610, paras. 52 and 54.

5. North, "Choice in choice of law", 3 *King's College Law Journal* (1992), 29–48, 30.

reasons why mobility should be accompanied by a change in legal regime. On the other hand, some indirect choices of law can detrimentally affect labour markets, workers, and social security systems. In sections 3 and 4, the article criticizes the rules for posted workers and employees who normally work in more than one Member State. These rules allow a worker to be subject to the social security system of a State with which they have only a tenuous link, and to be excluded from the social security system of States with which they are meaningfully connected. Moreover, those conflict rules excessively facilitate indirect choice of law, to the detriment of workers, competitors, and social security systems.

Third, how can undesirable forms of law shopping be countered? This article adds to the literature by identifying and analysing several strategies that legislatures and courts can and do adopt (section 5). These include the (re)design of conflict rules, their teleological interpretation, the framing of law shopping as abuse, and the improvement of the enforcement of and compliance with EU law. Some recent ECJ judgments hinder law shopping, as would pending proposals to amend the social security Regulations.

A brief terminological aside before starting: this article borrows the language of "indirect choice of law" from private international law, and mostly sticks to "law shopping". Both are more accurate than "forum shopping"[6] and synonymous to, but more evocative than, "regulatory arbitrage".[7] In EU social policy and in the vernacular, the phenomenon is also referred to as "social dumping".[8] That term is too loaded and ambiguous for present purposes. Yet, this article angles for the attention of readers interested in social dumping and, more broadly, the balance between the economic and social dimensions of the EU.

6. "Law shopping" differs from "forum shopping", even though they are sometimes used interchangeably (e.g. Case C-20/12, *Giersch* v. *État du Grand-Duché de Luxembourg*, EU:C:2013:411, para 80; Opinion of A.G. Mengozzi in Case C-523/13, *Larcher* v. *Deutsche Rentenversicherung Bayern Süd*, EU:C:2014:2260, para 62) and a forum can be appealing because of the law it is likely to apply. In private international law, a judge (the forum) can apply foreign law. Therefore, litigants might indulge not only in law shopping but also in forum shopping by launching proceedings in the jurisdiction that is most favourable to them. In matters of social security, courts and administrations only apply their own law (though they can take foreign law into account). Consequently, to shop for a forum is also to shop for its law.

7. Defined as "the action by which mobile economic actors seek to take advantage of regulatory differences between jurisdictions in order to reduce costs or to gain an advantage" by Schammo, "Arbitrage and Abuse of Rights in the EC Legal System", 14 ELJ (2008), 351–376, 353.

8. Defined e.g. as "the practice, undertaken by self-interested market participants, of undermining or evading existing social regulations with the aim of gaining a competitive advantage" by Bernaciak, "Introduction: Social dumping and the EU integration process" in Bernaciak (Ed.), *Market Expansion and Social Dumping in Europe* (Routledge, 2015), p. 2.

2. The *lex loci laboris*

The first half of this article discusses the extent to which some of the conflict rules of Regulation 883/2004 do, and should, facilitate or complicate law shopping. The main conflict rule, the *lex loci laboris*, subjects workers to the social security legislation of the Member State in which they currently pursue their activity.[9] Accordingly, workers active in Germany enjoy German social protection, and they and their employers pay social security contributions at the German rate.

The *lex loci laboris* brings about equal treatment in the State of work, and therefore aligns perfectly with Article 45 TFEU. It ensures that workers have access to the social security schemes of a State with which they are connected, as that is where they spend their working time. The *lex loci laboris* levels the playing field for employers whose staff is active in one Member State. Whether undertakings are based in Leipzig or Lithuania, in Germany they compete on the basis of German law. The *lex loci laboris* embodies host regulation and reflects the "regulatory neutrality paradigm", which aims to enable inter-firm competition within a market and to protect it from distortions due to the differences between national legal orders.[10] The *lex loci laboris* prevents Lithuania from benefiting from its lower contribution rate. Conversely, it does not incite Germany to question the viability of its higher rate: Germany does not need to fear an exodus of companies seeking to circumvent its legislation on the basis of the *lex loci laboris*, as it is indifferent to the location of the employer.[11] Admittedly, that conflict rule enables an undertaking to relocate the (near-)entirety of its activities from one Member State to another and to benefit from the lower social costs prevalent there, while exporting goods across the EU.[12] Such "international social competition" is inherent in the internal market in the absence of harmonization.[13] The *lex loci laboris* opposes the much more problematic "internal social competition", whereby an undertaking's staff is active in one Member State while governed by the law of another Member State.

9. Art. 11(3)(a) Regulation 883/2004.

10. Saydé, "One law, two competitions: An enquiry into the contradictions of free movement law", 13 CYELS (2010–2011), 365–413, 379, 386, 388–390.

11. Art. 21 Regulation 987/2009, laying down the procedure for implementing Regulation 883/2004, O.J. 2009, L 284/1.

12. The same is true for services that do not involve the movement of people.

13. See Van Hoek, "Re-embedding the transnational employment relationship: A tale about the limitations of (EU) law?", 55 CML Rev. (2018), 449–487, 462; van Overbeeke, *Sociale Concurrentie en Conflictenrecht in het Europees Wegtransport*, Unpublished PhD University of Antwerp, 2018, pp. 29–30.

3. The posting rule

If the *lex loci laboris* has merits, it also has limitations. When an employer sends a worker abroad for short stints, it would shift the applicable law twice within a brief time span: when they leave and when they return. The employer and the worker would have to familiarize themselves with foreign law and abide by the contribution and other duties it imposes, not long before affiliating again to the initial social security system. This would hinder the employer's freedom to provide services and inconvenience all involved for no good reason. That is why the *lex loci laboris* is flanked by the posting rule, which keeps workers sent abroad subject to the laws of the State in which their employer is established for up to two years.[14]

Posting is an instance of home regulation[15] and regime portability:[16] it enables a company to "export" the laws of its home State (e.g. Lithuania) while being exempt from the laws of the host State (e.g. Germany). For both States, it is an exception to the idea that social security law applies in a territorial fashion: local (German) law is disapplied, while non-local (Lithuanian) law is applied.[17] Posting is a growing phenomenon. Between 2010 and 2018, the annual number of certificates for posting increased by 71 percent to 1.8 million.[18] While it is an obligation that such certificates be requested and issued,[19] the gap between theory and practice is assumed to be sizeable.[20]

The posting rule grants workers equal treatment, not in the State where they currently work,[21] but in the State of their employer. It benefits employers established in a State with lower contribution rates than those of the host State ("low-to-high movements"): for instance, they compete in Germany on the basis of Lithuanian rules. The regulatory differences between States shape the

14. Art. 12(1) Regulation 883/2004.

15. Saydé, op. cit. *supra* note 10, 387, 390.

16. In labour law, see e.g. Deakin, "Regulatory competition after *Laval*", 10 CYELS (2007–2008), 581–609.

17. Verschueren, "Cross-border workers in the European internal market: Trojan horses for Member States' labour and social security law?", 24 *International Journal of Comparative Labour Law and Industrial Relations* (2008), 167–199, at 185, 187 et seq.

18. De Wispelaere, De Smedt and Pacolet, *Posting of workers: Report on A1 Portable Documents issued in 2018* (Publications Office of the European Union, 2020), p. 27.

19. Arts. 15 and 19, Regulation 987/2009.

20. E.g. Pennings, *European Social Security Law*, 5th ed. (Intersentia, 2010), p. 107.

21. Joined cases C-49, 50, 52–54 & 68–71/98, *Finalarte Sociedade de Construção Civil Ld[a]*, EU:C:2001:564, paras. 21–23. The Grand Chamber, however, granted a posted worker the right to equal treatment in the host State in circumstances where his employer did not risk being negatively affected: Joined Cases C-611 & 612/10, *Hudziński* v. *Agentur für Arbeit Wesel – Familienkasse and Wawrzyniak* v. *Agentur für Arbeit Mönchengladbach – Familienkasse*, EU:C:2012:339, paras. 82–84.

inter-firm competition on the German market, with local businesses at a disadvantage.

Such internal social competition might also foster competition between States. Regulatory competition is "a process whereby legal rules are selected (and de-selected) through competition between decentralized, rule-making entities".[22] The theory of regulatory competition conceives of law as a product traded on a market.[23] On the demand side, undertakings can choose the law that suits them best, primarily by voting with their feet.[24] On the supply side, the theory predicts that national rule-makers respond to the legal preferences expressed through (credible threats of) mobility by adapting their laws so as to attract, or at least retain, undertakings.

The preconditions for regulatory competition to occur are not always realized.[25] At the very least, it presupposes diversity between rules, the possibility for undertakings to choose between them, and responsiveness of rule-makers to such choices. For the present purposes, it suffices to note that regulatory competition is unlikely if undertakings can only select the applicable social security law with great difficulty.

The effects of regulatory competition are a subject of debate. The original theory predicted efficiency, and some argue that it induces a "race to the top".[26] In relation to social security, the fear is that, if anything, regulatory competition leads not to optimal laws, but to a "race to the bottom". The funding of social security is thought to be "highly vulnerable to the pressures of international regulatory competition".[27] If firms were to compete on a large scale in Germany on the basis of less onerous foreign social security law, pressure might accumulate on Germany to lower (or at least not to raise) its

22. Barnard and Deakin, "Market access and regulatory competition" in Barnard and Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing, 2002), p. 198.

23. For a wide-ranging account with particular attention to conflict rules, see Ribstein and O'Hara, *The Law Market* (OUP, 2009); for a recent overview in the context of the EU, see Costamagna (Ed.), "Special section – Regulatory competition in the EU: Foundations, tools and implications", 4 *European Papers* (2019), 123–250.

24. Given the inequality of bargaining power in the employment relationship, workers' influence over such choices is limited; indirect choices of law are made by undertakings and reflect their interests.

25. E.g. Barnard, "Social dumping and the race to the bottom: Some lessons for the European Union from Delaware?", 25 EL Rev. (2000), 57–78; Rühl, "Regulatory competition" in Basedow, Rühl, Ferrari and de Miguel Asensio (Eds.), *Encyclopedia of Private International Law* (Edward Elgar Publishing, 2017).

26. Tiebout, "A pure theory of local expenditures", 64 *The Journal of Political Economy* (1956), 416–424; Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995).

27. Scharpf, "Introduction: The problem-solving capacity of multi-level governance", 4 *Journal of European Public Policy* (1997), 520–538, 525.

contribution levels, which would have obvious implications for its benefit levels. A reduction in German contribution rates would narrow Lithuania's competitive edge, unless Lithuania were to follow suit.

Admittedly, this is an oversimplified sketch of a complex and uncertain process, one which requires close empirical attention.[28] Still, one key lesson is that the easier it is for undertakings to choose the most congenial (i.e. cheapest) social security system, the more likely it is that regulatory competition occurs. Another is that such competition, even if it does not degenerate into a race to the bottom, is likely to put pressure on generous social security systems. Such an outcome would run counter to national goals as well as the EU objectives of combating social exclusion and promoting social justice and protection.[29]

For the last half century, the posting rule has been associated with law shopping.[30] The following pages probe the limits of that rule with a view to identifying when it is truly problematic.

3.1. *An employer's perspective: Letterbox companies*

The *Plum* case illustrates a failed attempt to use posting as a vehicle for indirect choice of law.[31] Mr Plum, owner of two German construction companies, founded a Dutch company, Senator, in order to benefit from the lower labour costs prevailing in the Netherlands. Senator performed work only for the two German companies, by posting its employees exclusively to German construction sites. In the Netherlands, Senator maintained an office, occupied only by the manager who dealt with correspondence, answered phone calls, and conducted interviews. Other than purely internal management, Senator performed all its activities in Germany.

What connection, then, must the employer have with a Member State to benefit from the posting rule? To start with, it must be established there.[32] This condition does not generally rule out letterbox companies – there was no doubt that Senator was established in the Netherlands. It is relatively easy to

28. Radaelli, "The puzzle of regulatory competition", 24 *Journal of Public Policy* (2004), 1–23.

29. Art. 3(3) TEU.

30. See Règlement n° 24/64 portant modification de l'article 13 du règlement n° 3 et de l'article 11 du règlement n° 4 (législation applicable aux travailleurs détachés et aux travailleurs exerçant normalement leur activité dans plusieurs pays), O.J. 1964, 47/746; Opinion of A.G. Dutheillet de Lamothe in Case 35/70, *Manpower* v. *Caisse primaire d'assurance maladie de Strasbourg*, EU:C:1970:104, at pages 1264–1265.

31. Case C-404/98, *Plum* v. *Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln*, EU:C:2000:607.

32. Art. 14(2) Regulation 987/2009.

relocate the place of establishment of an undertaking, or to create a new undertaking or secondary establishment abroad.[33]

While the initial social security Regulations only required establishment,[34] the ECJ raised the necessary level of connection between the employer and the posting Member State. The posting undertaking must "normally" carry out its activities in the State in which it is established.[35] This is to be understood as the ordinary performance of substantial activities, other than purely internal management.[36] That is the reason why the ECJ denied Senator the advantage of the posting regime. Relevant criteria to determine whether that threshold is reached

> "include the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member State concerned".[37]

Further indicators and specifications are laid down in soft law. For instance, the Member States, sitting in the Administrative Commission for the Coordination of Social Security Systems, draw attention to "the length of time an undertaking is established in the posting Member State" and consider that a "turnover of approximately 25 percent of [the] total turnover in the posting State could be a sufficient indicator, but [add that] cases where [the] turnover is under 25 percent would warrant greater scrutiny".[38] While surmountable, this threshold makes it more difficult for an undertaking to choose the applicable law simply by setting up shop in a Member State with a congenial social security system. The original connecting factor, establishment, has been

33. Sørensen, "The fight against letterbox companies in the internal market", 52 CML Rev. (2015), 85–117, 86–97.

34. Art. 13(a) Règlement n° 3 concernant la sécurité sociale des travailleurs migrants, O.J. 1958, 561.

35. Case 35/70, *Manpower*, para 16; now Art. 12(1) Regulation 883/2004.

36. Art. 14(2) Regulation 987/2009. See also Case C-784/19, *TEAM POWER EUROPE*, pending.

37. Case C-202/97, *Fitzwilliam Executive Search* v. *Bestuur van het Landelijk instituut sociale verzekeringen*, EU:C:2000:75, para 43.

38. Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland (Brussels, 2013), 9.

tightened over the years. As a result, the fight against letterbox companies as regards the posting rule compares rather favourably to other areas of EU law.[39]

3.2. *A service recipient's perspective: Carousels*

A second strategy for law shopping is for the service recipient – the contracting party of the posting employer – to continuously satisfy its staffing needs with posted workers. In low-to-high movements, the employer's reduced labour costs should be reflected in the bill. To maximize this saving, service recipients might seek to durably outsource work to a succession of posted workers who hand over after two years.

The first social security Regulations did not rule out carousels of posted workers.[40] The Council closed this loophole by stipulating that a posted worker cannot replace another posted person.[41] The limits of this non-replacement condition were probed in *Alpenrind*.[42] For several years, Alpenrind, an Austrian company operating an abattoir, outsourced meat-cutting to posted workers. They were successively sent by two Hungarian undertakings: as soon as Alpenrind's contract with Martin-Meat came to an end, it was replaced by a contract with Martimpex-Meat that lasted precisely two years, after which Alpenrind immediately concluded another contract with Martin-Meat. These Hungarian undertakings seemed to share staffing and organizational resources. While the referring court found no evidence of abuse of EU law,[43] these are the exact arrangements that undertakings intent on getting round the non-replacement condition would put in place. The ECJ prohibited the construction: a worker who replaces a posted worker cannot themselves be posted, even if they are sent by different employers. It is irrelevant whether the posting employers have their registered offices in the same Member State and whether they have organizational or staff connections. There is prohibited replacement as soon as a service recipient replaces one posted worker with another. As the referring court observed, this interpretation of the non-replacement condition makes it harder to circumvent social security law abusively.[44]

Nonetheless, that condition remains a weak link in the prevention of law shopping. While immediate replacement is prohibited, it is unclear how much

39. Sørensen, op. cit. *supra* note 33.
40. Art. 13(a) Regulation 3/58.
41. Regulation 24/64; now Art. 12(1) Regulation 883/2004.
42. Case C-527/16, *Salzburger Gebietskrankenkasse and Bundesminister für Arbeit, Soziales und Konsumentenschutz* v. *Alpenrind*, EU:C:2018:669.
43. Judgment of the Verwaltungsgerichtshof of 10 Oct. 2018, ECLI:AT:VWGH:2018:RO2016080013.J00, para 42.
44. Case C-527/16, *Alpenrind*, para 33.

time must pass before it is considered that one posted worker no longer replaces another. The Member States, sitting in the Administrative Commission, held that two months must elapse between two postings involving the same worker, employer, service recipient, and State, whilst permitting derogations in specific circumstances.[45] That non-binding[46] decision slows down the carousel rather than stopping it, and says nothing about replacement by different workers or employers. Moreover, the non-replacement condition is hard to monitor[47] and seemingly hardly monitored.[48]

3.3. *A worker's perspective: Career-long posting*

Whether the posting rule applies or not has a marked effect on the labour costs of employers and service recipients. But the posted workers themselves have the greatest stake in the applicable legislation, as it shapes not only their contribution duties, but also their social protection. Other things being equal, workers should be subject to the social security system of a State with which they have a meaningful connection.[49] While many posted workers are strongly connected to the home State, this is a likelihood rather than a certainty.

Little integration is needed before a worker is first posted. The condition that posted workers are "permanently resident" in the home State has long been dropped.[50] All that is required is that the worker was subject to the legislation of the home State just before being hired by an employer, who can immediately post him or her.[51] The Administrative Commission suggests that

45. Paragraph 3(c) Decision A2 of the Administrative Commission concerning the interpretation of Art. 12 of Regulation 883/2004 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, O.J. 2010, C 106/5.

46. Case 98/80, *Romano* v. *Institut national d'assurance maladie-invalidité*, EU:C:1981:104.

47. Jorens, "Detachering en sociale zekerheid: Het juridisch kader" in Jorens (Ed.), *Handboek Europese Detachering en Vrij Verkeer van Diensten* (die Keure, 2009), pp. 75–77.

48. Biletta, Cabrita and Gerstenberger, "Improving the monitoring of posted workers in the EU", (Eurofound Ad Hoc Report 2020), available at <www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef19054en.pdf>, 16–17. See further *infra*, section 5.6.

49. Rennuy, "The trilemma of EU social benefits law: Seeing the wood and the trees", 56 CML Rev. (2019), 1549–1590, 1552–1555.

50. Art. 13(a) Regulation 3/58; Case 19/67, *Bestuur der Sociale Verzekeringsbank* v. *van der Vecht*, EU:C:1967:49, at p. 353.

51. Art. 12(1) Regulation 883/2004; Art. 14(1) Regulation 987/2009; Case C-451/17, *Walltopia* v. *Direktor na Teritorialna direktsia na Natsionalnata agentsia za prihodite — Veliko Tarnovo*, EU:C:2018:861.

workers recruited in order to be posted should have been subject to the legislation of the home State for one month before the posting, with shorter periods being examined on a case-by-case basis.[52] As there is no trace of such a period (yet) in the case law,[53] one day might even suffice.[54]

While posted, it is inevitable that the worker is mostly or entirely absent from the home State. Although no personal links are necessary during the posting, the worker ought to be connected to the posting undertaking, which in turn ought to be connected to the home State. The posting undertaking and the posted worker must remain bound by "a direct link".[55] The latter must be an employee of the former and remain under its authority. And, as indicated, the posting undertaking must ordinarily perform substantial activities in the home State.

The lack of guarantees of integration before and during the posting is not compensated afterwards. The longer the posting, the more the worker's links with the home State dwindle. If the tie between integration and social protection is not to be severed, the worker should return to that State within and for a certain period of time. This idea is poorly captured by Regulation 883/2004. The two-year maximum limits the duration of a single posting rather than the total time the worker spends outside the home State. The non-replacement condition bans repeated postings to one service recipient, but allows one worker to be continuously posted to different service recipients, certainly if they are based in different Member States.[56] As the Regulation sets no "homecoming" requirement, workers can be posted for their entire career.

Of course, a worker might have been integrated in the home State before being posted, might maintain connections with that State while posted, and might return to work there afterwards. Many posted workers may fit that description, but these are not *legal* requirements. A worker who first sets foot in Portugal on Monday, works a shift for a temporary employment agency on Tuesday, can be hired by a company on Wednesday and posted without further ado. This worker can remain affiliated to the Portuguese social security system for his or her entire career, without ever returning to Portugal.[57] The posting rule allows a near-complete divorce between workers' integration and

52. Para 1 Decision A2 of the Administrative Commission.
53. Case C-451/17, *Walltopia*, which admittedly is not entirely conclusive.
54. Jorens, op. cit. *supra* note 47, pp. 46–49.
55. Case C-202/97, *Fitzwilliam*, para 24; Art. 12(1) Regulation 883/2004.
56. See further Para 3(a) Decision A2 of the Administrative Commission.
57. It is assumed that a single shift suffices and that reliance on the posting rule would not be denied on the grounds of abuse of EU law (see *infra*, section 5.5).

their social protection. The employment relationship is then uprooted, not temporarily, but durably.[58]

Amendments to the social security Regulations are currently being negotiated. The latest available text is a trilogue compromise that was narrowly defeated in the Council in March 2019 (hereinafter the "Draft Regulation"). It would slightly contribute to restoring the nexus between integration and protection, first, by introducing a minimum period of prior affiliation for those workers who were recruited with a view to being posted, so as to reinforce their "link with the social security system of the Member State of origin".[59] They can be posted only if they have been subject to its legislation for the three months immediately preceding the start of their job.[60] The Draft Regulation would also impose a waiting period between postings: a worker who has been posted for 24 months would in principle have to wait two months before he or she can be posted again.[61] Both interventions would be small steps in the right direction, but neither guarantees that posted workers are meaningfully connected to the competent State.

3.4. *The wheat and the chaff*

When should opportunities for law shopping be curbed? One theme running through this section is that conflict rules are problematic when they enable undertakings to choose the applicable law "on the cheap". This would be the case if all it took was to set up a letterbox company or organize a rotation of posted workers. The benefits of law shopping would far outweigh its cost, making it an appealing proposition for undertakings. Because of its negative externalities, law shopping should not be all too easy. Its costs are borne by third parties: local competitors suffer from unfair competition, which in turn might affect their staff's working conditions and employability; and the circumvented social security system experiences a net shortfall in revenue[62] and possibly a downwards pressure. For the posted workers themselves, law

58. On the idea of embedding the employment relationship in the State where the work habitually takes place, see Van Hoek, op. cit. *supra* note 13.

59. General Secretariat of the Council, Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 – Analysis of the final compromise text with a view to agreement, 7698/19 Add 1 Rev 1, recital 16a.

60. Art. 2(8)(a) Draft Regulation, ibid. The Parliament sought to apply this waiting period to all posted workers (European Parliament, Committee on Employment and Social Affairs, Report on the proposal for a regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 (C8-0521/2016, 23 Nov. 2018), Amendment 73).

61. Art. 2(8)(aa) Draft Regulation.

62. Posted workers are likely to be net contributors to welfare budgets.

shopping tends to entail a trade-off between diminished social protection and improved employability. Given their inferior bargaining position, they are unlikely to have much choice in the matter – indeed, that is the very reason why workers are protected against the consequences of contractually choosing an unfavourable labour law.[63]

A second criterion that emerges from the above pages concerns the social protection of workers rather than the contribution burdens of undertakings. Ideally, conflict rules would base social protection on the worker's integration. Despite commendable efforts against letterbox companies and carousels, EU law fails to guarantee a modicum of integration of posted workers in the competent State.

In sum, then, opportunities for law shopping should not be excessive, first, for the sake of labour markets, workers and social security systems; and, second, because workers' social protection should be informed by their integration. Together, these evaluative criteria help to separate unobjectionable exercises of free movement rights from undesirable forms of law shopping.

4. The multi-activity rule

Neither the *lex loci laboris* nor the posting rule are suited for those who normally (rather than temporarily) work in two or more States. Article 13 of Regulation 883/2004 instead provides separate conflict rules for them. As their use grows – the number of certificates quintupled between 2010 and 2018[64] – so does the awareness of their potential misuse, which both the last substantial amendment to Regulation 883/2004 and the Draft Regulation seek to thwart.[65] After some general observations, this section will focus on one of these conflict rules: Article 13(1)(b)(i) (hereinafter "the multi-activity rule").

The *Calle* case illustrates one issue raised by the conflict rules of Article 13 Regulation 883/2004.[66] The question was whether a German retailer established close to the Danish border ought to pay German or Danish social security contributions. For at least five years, one of Calle's employees, Mr Wandahl, was primarily active in Germany, but also worked in Denmark, where he lived, for about ten hours each week. The ECJ confirmed that he was

63. Recital 23 and Art. 8 Regulation 593/2008 on the law applicable to contractual obligations (Rome I), O.J. 2008, L 177/6.

64. De Wispelaere et al., op. cit. *supra* note 18, p. 39.

65. Regulation 465/2012 amending Regulation 883/2004 and Regulation 987/2009, O.J. 2012, L 149/4.

66. Case C-425/93, *Calle Grenzshop Andresen* v. *Allgemeine Ortskrankenkasse für den Kreis Schleswig-Flensburg*, EU:C:1995:37.

subject only to Danish law. Given that employers' contribution rates are negligible in Denmark and relatively high in Germany, Calle could employ staff in Germany at lower cost than its competitors. Had Mr Wandahl instead been subject only to German law, Calle would have been put at a competitive disadvantage, as its activities in Denmark would have been charged at the higher German rate. Any attempt to subject a person who normally pursues his or her activities in two Member States to the laws of one State inevitably creates a competitive imbalance on the territory of the other State.[67]

The solution most apt to ensure regulatory neutrality would be to subject a worker to the legislation of each State as regards the activity pursued there. The predecessor of Regulation 883/2004 provided such a possibility: in certain cases, each activity was charged at the local rate.[68] But such concurrent application of several legal orders entailed a high administrative burden and the risk that social protection would be either excessive or insufficient.[69] Under Regulation 883/2004, only one Member State is competent and levies contributions on all income, whether earned on its territory or in another Member State.[70] This approach creates room for law shopping, as it provides that the activities in the non-competent State(s) are taxed at the rate of the competent State. As a result, undertakings can compete on a labour market on the basis of foreign law.

Article 13(1) Regulation 883/2004 lays down conflict rules for persons normally pursuing an activity as an employed person in more than one Member State. A first rule subjects them to the law of their State of residence provided they substantially work there. Much more problematic is the conflict rule for those who do *not* pursue a substantial part of their activity in their State of residence. The "multi-activity rule" laid down in Article 13(1)(b)(i) provides that if these workers are employed by one undertaking, they are subject to the legislation of the Member State in which it has its registered office or place of business.[71]

Strikingly, the multi-activity rule is almost entirely indifferent to the circumstances of the worker. While workers might work in the State in which

67. This article assumes a difference in contribution rates.

68. Art. 14c(b) Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, O.J. 1971, L 149/2; Case C-340/94, *de Jaeck* v. *Staatssecretaris van Financiën*, EU:C:1997:43, para 40.

69. Rennuy, op. cit. *supra* note 49, 1582–1583.

70. Art. 13 Regulation 883/2004.

71. The same is true if they have several employers, whose registered offices or places of business are in the same Member State. If these employers' registered offices or places of business are located in different Member States, workers are subject to the legislation of one of these States or the legislation of their State of residence, depending on circumstances (Art. 13(1)(b)(ii)-(iv) Regulation 883/2004). Much of the criticism developed in the main body of text also applies to these conflict rules.

their employer has its registered office or place of business, that is only a likelihood. It is entirely possible for this conflict rule to subject a worker to the social security system of a State in which they never have, and never will, set foot. This is a clear departure from the integration–protection nexus. Moreover, it sits uneasily with Article 45 TFEU, because it can deprive the worker of access to the social security schemes of *all* the Member States in which he or she works.

Attaching importance exclusively to the circumstances of the employer intrinsically increases the risk of law shopping, insofar as it renders the place of the workers' economic activity irrelevant to the determination of the applicable legislation. An employer may maintain fully-staffed establishments in two Member States while paying the contribution rates of a third. Just like the posting rule, the multi-activity rule is based on home regulation and regime portability.

This vulnerability to law shopping is compounded by the *relative* ease with which the registered office or place of business can be moved. It is defined as the place "where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out".[72] To trigger the law of a particular Member State, an employer must move its real seat there, but it is not obliged to perform *substantial* activities there. The Commission's proposal to introduce such a requirement would have hindered law shopping.[73] A slightly different approach emerged from the trilogues. The Draft Regulation fleshes out the notion of "the registered office or place of business", which is to be located on the basis of an overall assessment that gives due weight to the following criteria: "the turnover, the number of services rendered by its employees and/or income, the working time performed in each Member State where the activity is pursued, the places where general meetings are held, and the habitual nature of the activity pursued".[74] This welcome attempt to tighten the connecting factor, thus complicating law shopping, has proved highly divisive: it is said to be one of the few remaining stumbling blocks for the adoption of the Draft Regulation and its fate is hard to predict.[75]

72. Art. 14(5a) Regulation 987/2009.

73. Art. 2(8)(b) Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004, COM(2016)815final. The Administrative Commission tries to raise the threshold of the registered office or place of business through soft law (see Practical guide cited *supra* note 38, 35–36).

74. Art. 2(8)(b) Draft Regulation.

75. Letter from the Dutch Ministry of Social Affairs and Employment (4 Nov. 2019), available at <www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2019Z21072&did=2019D43928>.

While posting is the phenomenon most readily associated with law shopping, the multi-activity rule is even more susceptible to manipulation. A first difference with posting is that the employer does not have to ordinarily carry out substantial activities in the competent Member State. Second, while the two-year limit on posting and the non-replacement condition might be weak, there are no such constraints on the multi-activity rule. Third, unlike the posting rule, the multi-activity rule does not require the worker to set foot in the competent State. Compared to posting, the costs of law shopping seem lower, as fewer conditions must be fulfilled, and the rewards greater, as there is no time limit.

Admittedly, the multi-activity rule has redeeming features. It is convenient for employers, who can apply familiar legislation that is unlikely to switch as time passes. Many workers are active in the State where their employer has its place of business or registered office, which then functions as an imperfect proxy for the place of work. If, and only if, the activities are sufficiently short-lived to qualify as services, this conflict rule could be seen as an emanation of the employer's freedom to provide services on the basis of the law of its State of establishment. But the multi-activity rule is precisely meant to apply to activities that are "habitually, that is, as a rule rather than merely exceptionally or *temporarily*, exercised on the territory of two or more Member States".[76] At any rate, none of this compensates for the detriment to the integration–protection nexus, the free movement of workers, fair competition, and (if regulatory competition materializes) social security systems. Why subject persons who work in two States, and possibly reside in a third State, to the legislation of yet another State, with which they may have no links and in which their employer carries out no substantial activities?

In conclusion, some of the main conflict rules of the Regulation have contrasting effects. The *lex loci laboris* serves regulatory neutrality; the posting rule and the multi-activity rule facilitate law shopping and regulatory competition. The *lex loci laboris* bases workers' social protection on their integration; the posting rule and the multi-activity rule allow social protection and integration to be virtually unrelated. The *lex loci laboris* makes indirect choice of law costly, as workers have to relocate their entire professional lives, while fewer constraints are attached to choices of law through the posting rule and the multi-activity rule.[77] The *lex loci laboris* incarnates host regulation and provides for the territorial application of social security law; the posting rule and the multi-activity rule realize home regulation and derogate from

76. Opinion of A.G. Bot in Case C-189/14, *Chain* v. *Atlanco*, EU:C:2015:432, para 56 (our translation; emphasis added).

77. Saydé on the contrary characterizes the *lex loci laboris* as a "free" choice of host law and the posting rule as a "restricted" choice of home law, op. cit. *supra* note 10, 395–397, 410.

territoriality. The *lex loci laboris* entitles workers to equal treatment in the State in which they work, in line with Article 45 TFEU; the posting rule and the multi-activity rule disentitle workers from the social security system of at least one State in which they work, which may be in line with the freedom to provide services. A normative fault line therefore runs through Regulation 883/2004, pitting the *lex loci laboris* against its alternatives.

5. Private strategies and public counterstrategies

The remainder of this article looks more broadly at the strategies that private actors can put in place to influence the applicable legislation, as well as the actual and potential reactions of public actors.

5.1. *Tightening connecting factors*

A strategy encountered time and again is the relocation of the connecting factor. The obvious counter-strategy is to make it harder to relocate by heightening the requisite connection between a State and workers or employers. Both evaluative criteria support the tightening of connecting factors: (i) this ensures that integration and social protection go hand in hand, and (ii) it increases the costs of law shopping, thus decreasing its appeal and the risk it poses to workers, competitors and social security systems.

If the posting rule and the multi-activity rule are not to excessively facilitate law shopping while disconnecting workers' social protection from their integration, they ought to be tightened further. The necessary connection before, after and/or between postings could be raised; or the period of posting could be shortened, as the European Parliament proposed (in vain).[78] As to the multi-activity rule, a personal tie between the worker and the competent Member State, be it work or residence, ought to be required. None of this is to deny that those rules have a valid rationale, which excessive tightening could impair.

5.2. *Softening connecting factors*

The softening of connecting factors is a second regulatory technique that complicates law shopping. Posting by letterbox companies could have been avoided by requiring that a certain percentage of the employer's turnover be realized in the home State. Such a precise rule would have enabled undertakings to organize their business so that they *just* reach the threshold.

78. European Parliament, Report cited *supra* note 60, Amendment 73.

Regulation 987/2009 instead requires undertakings to ordinarily perform substantial activities in the home State. Such a vague standard, which must be applied taking into account "all the criteria characterizing the activities",[79] incites undertakings wishing to post workers to err on the side of safety. Vagueness also opens up space for administrations and courts to counter law shopping without needing to bend the letter of the Regulations. There is a correlation between the ease in evading a rule and its precision. "Circumvention in many cases thrives on detailed rules, making use of the more textual – albeit seldom purpose-oriented – interpretations of applicable legal norms."[80] The more legal certainty, the greater the potential for abuse.[81]

Whether the connecting factors of Regulation 883/2004 ought to be softened, is a difficult discussion that should engage with the enduring debate on the relative virtues of certainty (criticized as being rigid) and flexibility (criticized as being vague).[82] Vague connecting factors compromise legal certainty and hinder the uniform interpretation and application of EU law. As a result, they increase the risk that more than one Member State considers itself competent and levies contributions, imposing a double burden on employers and workers. This article does not intend indiscriminately to recommend vagueness, but rather to flag up one of its qualities that has so far been overlooked in the literature on EU social security law: it complicates law shopping.[83]

5.3. *Favouring the lex loci laboris*

Another strategy is to manipulate, not the connecting factor, but rather the scope of conflict rules: the facts are made to fit whichever conflict rule designates the sought-after social security legislation. While the *lex loci laboris* might occasionally be chosen, undertakings seeking to exploit the differential in contribution rates are more likely to try to steer clear of that rule, because it is most apt at levelling the playing field. For instance, an employer

79. Case C-202/97, *Fitzwilliam*, para 42.

80. Kjellgren, "On the border of abuse – The jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of Community law", (2000) EBLR, 179–194, 179.

81. Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart Publishing, 2014), pp. 167 et seq.

82. See e.g. Endicott, "The value of vagueness" in Marmor and Soames (Eds.), *Philosophical Foundations of Language in the Law* (OUP, 2011); Schauer, "The convergence of rules and standards", (2003) *New Zealand Law Review*, 303–328. As regards conflict rules, see Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (OUP, 2014), Ch. 4.

83. As the ECJ acknowledged in respect of jurisdiction in private international law: Joined cases C-168 & 169/16, *Nogueira* v. *Crewlink Ireland and Moreno Osacar* v. *Ryanair Designated Activity Company*, EU:C:2017:688, para 62.

could instruct its staff living abroad to perform some work at home in a bid to fall under the rules on multi-activity rather than the *lex loci laboris*. In order to complicate such manoeuvres, the EU legislature decided that marginal activities are to be disregarded in such cases.[84]

In general, attempts at circumnavigating the *lex loci laboris* can be countered by firmly establishing its primacy and narrowing the scope of its alternatives. At first sight, the EU institutions do just that. The EU legislature describes the *lex loci laboris* as the "general rule", from which it can be "necessary to derogate" "[i]n specific situations".[85] The ECJ has long considered the posting rule and the conflict rules on multi-activity to be exceptions.[86] More recently, it explicitly held that, as a derogation, the posting rule is to be interpreted strictly.[87]

Upon closer inspection, the institutions' record is rather more mixed. Insofar as the EU legislature can take credit for most conditions attached to the posting rule and the multi-activity rule, this article argued above that further conditions would be welcome. In a number of cases, the ECJ has narrowed the scope of those conflict rules, mostly without mentioning law shopping or related concepts.[88] In others cases, however, the ECJ has broadened their scope at the expense of the *lex loci laboris*.[89] The ECJ's express statement that the posting rule ought to be interpreted narrowly might foreshadow a renewed fondness for the *lex loci laboris*.[90]

Not only the scope of the alternatives to the *lex loci laboris*, but also their number matters. The opportunities for law shopping increase with the number

84. Art. 14(5b) Regulation 987/2009; Proposal for a Regulation amending Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004, COM(2010)794 final, p. 9.

85. Recitals 17 and 18 Regulation 883/2004.

86. E.g. Case 19/67, *van der Vecht*, at p. 353 (on Regulation 3/58); Case C-404/98, *Plum*, paras. 14–15 (on Regulation 1408/71).

87. Case C-527/16, *Alpenrind*, para 95 (on Regulation 883/2004, contradicting Opinion of A.G. Saugmandsgaard Øe, paras. 85–86). Early signs of such an approach were visible in Case C-202/97, *Fitzwilliam*, in particular para 30.

88. E.g. Case 35/70, *Manpower*, para 16 (introducing the requirement that the posting employer normally carries out its activities in the home State); Case C-202/97, *Fitzwilliam* (fleshing out the requisite links between the posted worker and the employer, and between the latter and the home State); Case C-570/15, *X* v. *Staatssecretaris van Financiën*, EU:C:2017:674 (disregarding merely occasional activities in a second Member State, in part to avoid conflict rules being circumvented); Case C-527/16, *Alpenrind* (strengthening the prohibition on replacement of posted workers).

89. E.g. Case 19/67, *van der Vecht*, at pp. 353–354 (the requirement in Regulation 3/58 that posted workers are "normally attached" to their employer does not prevent employers from hiring workers exclusively in order to post them); Case 35/70, *Manpower*, para 15 (temporary employment agencies can post workers).

90. Case C-527/16, *Alpenrind*, para 95.

of conflict rules that might designate different Member States. Undertakings might contrive to fall under whichever conflict rule points to the most congenial social security system. Because of the sheer number of conflict rules – no fewer than nine conflict rules on multi-activity[91] in addition to the *lex loci laboris* and the posting rule – several social security systems are on offer. If the choice is not to be made by undertakings, the border between each of these conflict rules ought to be policed effectively.

In summary, the very existence of several conflict rules opens room for circumvention. The counter-strategy is to favour the *lex loci laboris* by limiting the scope and number of derogations. This further strengthens the case for attaching supplementary conditions to the posting rule and the multi-activity rule, though care must be taken not to endanger their legitimate *raison d'être* by curtailing them excessively.

5.4. *Teleological interpretation*

The rulings discussed so far have exemplified the role of interpretation in increasing or decreasing the vulnerability of Regulation 883/2004 to indirect choice of law. Textual interpretation tends to facilitate law shopping.[92] It enables undertakings to engineer the facts to match a precise and predictable rule, and it opposes the introduction of conditions to the posting or multi-activity rule that are not explicit in the Regulation. Whether teleological interpretation complicates law shopping, depends on the objective(s) pursued. For instance, a reading of conflict rules in the sole light of the freedom to provide services would strengthen the employers' capacity to compete across the EU on the basis of the law of their home State and to influence the applicable social security legislation.

The interpretation of the posting rule is primarily (though certainly not exclusively) steered by *its* objectives, among which the freedom to provide services takes pride of place.[93] While the importance of teleological interpretation remains unchanged, the ECJ has recently enriched the *telos*. In the 2018 *Alpenrind* case, it explicitly endorsed a narrow construction of the posting rule, on the grounds that it derogates from the general rule.[94] The ECJ understood the non-replacement condition as prohibiting replacement even by different employers. Much as its Advocate General opposed such an interpretation of the posting rule on the basis of its wording and its objectives,

91. 5 for employed persons, 2 for self-employed persons, and 2 for persons who combine statuses (Art. 13 Regulation 883/2004).

92. Kjellgren, op. cit. *supra* note 80, 179.

93. E.g. Case C-202/97, *Fitzwilliam*, para 28.

94. Case C-527/16, *Alpenrind*, para 95.

the ECJ convincingly grounded a reading that complicates law shopping by emphasizing the objectives of the *lex loci laboris* rather than the posting rule.

A second teleological shift occurred in the 2020 *AFMB* case with which this article opened.[95] As the international lorry drivers did not pursue a substantial part of their activity in the Netherlands, where they resided, the multi-activity rule subjected them to the laws of the State in which their employer's registered office or place of business was located. But who was their employer? The Cypriot AFMB with whom they had concluded employment contracts? Or rather the Dutch transport undertakings who had selected them, who exercised authority over them, who could effectively dismiss them, and who reimbursed AFMB for their wages? While the employment contracts named AFMB as the employer, the ECJ held that the actual performance of contracts takes precedence over contractual terms in case of discrepancy; social security institutions must pierce the contractual veil behind which undertakings might try to hide. It defined the employer as "the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs, and which has the actual power to dismiss that worker".[96] Accordingly, the ECJ identified the Dutch transport undertakings as the actual employers and thwarted the attempt to circumvent Dutch social security law.

The ruling's main import is the connection the Grand Chamber drew between the fight against abuse and the objectives of Regulation 883/2004. The ECJ buttressed its definition of the notion of employer on the basis of the objectives of both the multi-activity rule and the Regulation as a whole. It reiterated that Regulation 883/2004 aims to realize free movement and thus improve the living standards of migrant citizens, while respecting the features of national social security systems. The multi-activity rule serves these goals by preventing the complications that the *lex loci laboris* would entail, and designates the applicable legislation on the basis of the objective situation of workers. If the applicable legislation were instead based wholly on formal considerations such as contractual terms, undertakings could change it without contributing to the free movement objective. The applicable legislation would then depend on free choice, whereas it should depend only on the objective situation of workers. The ECJ proceeded to make a statement that should reverberate loudly:

> "the objective of [Regulations 883/2004 and 1408/71…] might be undermined if the interpretation adopted of the [concept of employer] were to make it easier for employers to be able to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of

95. Case C-610/18, *AFMB*.
96. Ibid., para 61.

> obtaining an advantage from the differences that exist between the national rules. In particular, such exploitation of that legislation would be likely to have a 'race to the bottom' effect on the social security systems of the Member States and perhaps, ultimately, reduce the level of protection offered by those systems."[97]

The ECJ thus made clear its dislike for law shopping, without shying away from taking a firm stance in the regulatory competition debate. Its ruling also serves the integration–protection nexus: the drivers had no link to speak of with Cyprus.

The interpretation of the posting rule and the multi-activity rule is therefore guided by their own objectives, by the objectives of the *lex loci laboris*, and by the wish to counter excessive law shopping. This is no screeching about-turn; the ECJ has always considered the *lex loci laboris* as the main conflict rule, and, whether intentionally or not, it has on occasion complicated law shopping.[98] Still, there is a marked inflection in the ECJ's tone and approach, which raises the question of whether some earlier case law facilitating (or at least not hindering) gain-seeking, purely artificial, arrangements might be ripe for revision. Teleological interpretation is a tool that can be wielded to negate all kinds of attempted law shopping.

5.5. *Doctrine of abuse of EU law*

The above counter-strategies might feel frustratingly roundabout – if the issue is that EU law is being abused, why not deploy the much-discussed doctrine of abuse of EU law? The ECJ formulated its test in *Emsland-Stärke*:

> "A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it."[99]

The ECJ – controversially – considers the doctrine of abuse to be a general principle of EU law.[100] Even if it permeates the whole of EU law, its shape and

97. Ibid., para 69.

98. See *supra*, notes 86–88.

99. Case C-110/99, *Emsland-Stärke* v. *Hauptzollamt Hamburg-Jonas*, EU:C:2000:695, paras. 52–53.

100. E.g. Case C-359/16, *Criminal proceedings against Altun*, EU:C:2018:63, para 49. Contesting this view: e.g. Arnull, "What is a general principle of EU law?" in de la Feria and

contours are tailored to the context.[101] As regards the social security Regulations, the ECJ has written about "[t]he principle of prohibition of fraud and abuse of rights" which entails that "Community law cannot be relied on for the purposes of abuse or fraud".[102] Yet, these rulings concerned fraud rather than abuse,[103] and in *AFMB* the Court again stops short of introducing the doctrine of abuse of EU law in Regulation 883/2004.

While two Advocates General have recently supported the application of the doctrine of abuse of EU law to counter the evasion of contribution duties,[104] it remains uncertain to what extent, and how, that doctrine – which is intrinsically uncertain[105] – applies to the conflict rules of Regulation 883/2004. At best, it would equip courts with a surgical tool with which they could deny attempts at law shopping that slipped through the net, outlawing for instance the everlasting posting of a worker. At worst, it would inject a dose of arbitrariness in the determination of the applicable legislation, exacerbating the risk that several Member States deem themselves competent to levy contributions from the same worker and employer.

Abuse can act not only as a general principle, but also as a lodestar for "a constructive interpretation of the applicable rules so as to exclude from their scope circumstances of abuse."[106] At present, that is its main role in EU social security law. Such anti-abusive interpretation is not strictly bound by the *Emsland-Stärke* criteria: it might counter constructions that yield no regulatory advantage or only yield such a gain unintentionally.

5.6. *Enforcement and compliance*

This article is more concerned with the substance of the law than its practical implementation. Yet, it is important to note that both the enforcement of and

Vogenauer (Eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011), pp. 18–23; Kamanabrou, "Abuse of law in the context of EU law", 43 EL Rev. (2018), 534–548.

101. Opinion of A.G. Bobek in Case C-251/16, *Cussens* v. *Brosman*, EU:C:2017:648, paras. 27–30; de la Feria and Vogenauer, op. cit. *supra* note 100.

102. Case C-206/94, *Brennet AG* v. *Paletta*, EU:C:1996:182, para 24; Case C-359/16, *Altun*, para 49.

103. Opinion of A.G. Tesauro in Case C-367/96, *Kefalas* v. *Dimosio*, EU:C:1998:41, footnote 28; Opinion of A.G. Saugmandsgaard Øe in Case C-359/16, *Altun*, EU:C:2017:850, para 49.

104. Opinion of A.G. Saugmandsgaard Øe in Case C-527/16, *Alpenrind*, EU:C:2018:52, para 111; Opinion of A.G. Pikamäe in Case C-610/18, *AFMB*, EU:C:2019:1010, paras. 72–84.

105. E.g. Vogenauer, "The prohibition of abuse of law: An emerging general principle of EU law" in de la Feria and Vogenauer, op. cit. *supra* note 100, pp. 545–546, p. 569.

106. Poiares Maduro, "Foreword" in de la Feria and Vogenauer, op. cit. *supra* note 100, vii.

the compliance with the Regulation's conflict rules are found wanting.[107] The social security institution of the home State should perform "a proper assessment of the facts" before issuing a certificate confirming that the worker is posted, which binds the social security institutions and courts of other Member States.[108] Yet, it regularly fails to carry out even the most cursory of checks.[109] This deficient administrative enforcement is all the more problematic because posting certificates can only be challenged in the courts of the State that issued them: it might not be feasible for workers and the social security institutions of the host State to sue in the home State in order to obtain the benefits and contributions that are their due.[110] The low likelihood of litigation and lax administrative enforcement make it relatively improbable that breaches of the Regulation's conflict rules (whether intentional fraud or unintentional error) are noticed, let alone remedied. This in turn enhances the opportunities for law shopping. None of this has escaped the attention of the EU legislature, which seeks to improve administrative enforcement.[111]

6. Conclusion

This article offers the first comprehensive analysis and evaluation of private strategies and public counter-strategies relating to indirect choice of social security law. It shows how and to what extent undertakings in the EU can exert control over the applicable law. The degree of private control over public law is high when undertakings can choose between a significant number of jurisdictions at low cost, and vice versa. While doctrinal work can identify vulnerabilities, empirical studies should shed further light on their exploitation.

Positive harmonization is a powerful antidote to law shopping: to reduce the differences between legal orders is to reduce the regulatory gain that exercising free movement rights can yield. But the prospect of meaningful harmonization of social security contribution rates is remote at best.[112]

107. As regards posting, see Rennuy, "Posting of workers: Enforcement, compliance, and reform", 22 EJSS (2020), 212–234.

108. Case C-202/97, *Fitzwilliam*, in particular para 51; Case C-2/05, *Rijksdienst voor Sociale Zekerheid* v. *Herbosch Kiere*, EU:C:2006:69.

109. Rennuy, op. cit. *supra* note 107, 219.

110. Only some certificates that are fraudulently obtained or relied upon can be challenged in the courts of both States. Case C-359/16, *Altun*; Joined cases C-370/17 & C-37/18, *CRPNPAC* v. *Vueling Airlines and Vueling Airlines* v. *Poignant*, EU:C:2020:260.

111. Regulation 2019/1149 establishing a European Labour Authority, O.J. 2019, L 186/21; Draft Regulation.

112. Even the most ambitious versions of the European unemployment benefits system being considered in the Eurozone would not palpably diminish the differences between

Nonetheless, the regulatory toolbox to counter law shopping is reasonably well stocked. The EU legislature and the ECJ can tighten and soften connecting factors, as well as favouring the *lex loci laboris*. The ECJ, national courts and social security institutions can counter excessive law shopping through teleological interpretation and possibly the doctrine of abuse of EU law. The improvement of the enforcement of and compliance with EU conflict rules is the shared responsibility of the legislative, executive, and judicial branches at EU and national levels. To evaluate whether a conflict rule's susceptibility to law shopping is excessive, this article complemented the familiar concern for labour markets and social security systems with a second evaluative criterion about the worker's connection to the competent State.

A key finding is that a normative fault line runs through Regulation 883/2004. The *lex loci laboris* embodies host regulation; implements Article 45 TFEU; aligns with the regulatory neutrality paradigm; complicates law shopping; and links social protection to integration. The opposite applies to the posting rule and the multi-activity rule. While those rules can be used entirely innocuously, they fail to rule out undesirable forms of indirect choice of law. The lack of necessary safeguards enables undertakings to select and deselect law that is in fact meant to be mandatory with relative ease, even though such constructions have negative externalities for workers, labour markets, and social security systems. In addition, the multi-activity rule and the posting rule fail to connect workers' social protection with their integration, and may well subject them to the social security system of States in which they have never or barely set foot.

Through the lens of the two evaluative criteria, it is possible to see the priorities of the EU legislature and the ECJ. Although the overall picture is messy, both seem to have taken a somewhat dimmer view of social security law shopping in recent years. If confirmed, this evolution would be congruent with several trends. Where *Alpenrind* and *AFMB* hinder the exit of net contributors to the welfare budget, *Dano* hinders the entrance of net beneficiaries (among others).[113] There is a growing focus on enforcement and compliance across EU social law,[114] and a somewhat whetted appetite for subjecting posted workers to the laws of the host State.[115]

Member States' social security contribution rates for employers. Beblavý and Lenaerts, *Feasibility and Added Value of a European Unemployment Benefits Scheme* (CEPS, 2017), pp. 20–21.

113. Case C-333/13, *Dano* v. *Jobcenter Leipzig*, EU:C:2014:2358.

114. E.g. Directive 2014/54 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, O.J. 2014, L 128/8; Directive 2014/67 on the enforcement of Directive 96/71, O.J. 2014, L 159/11; Regulation 2019/1149.

115. Directive 2018/957 amending Directive 96/71, O.J. 2018, L 173/16.

Ultimately, the issue of shopping for social security law ought to inform neighbouring debates. The discussion on the effects of social policy on inter-firm and regulatory competition centres on labour law, even though two of its features that social security law lacks – its partial harmonization and the routine cumulative application of the labour law of several Member States to one transnational employment relationship – complicate law shopping.[116] In the final analysis, the topic of this article is a much-overlooked facet of the debate on the calibration of the economic and social dimensions of European integration. It speaks directly to the elusive balance between free movement rights and the protection offered by welfare States in a "social market economy".[117]

116. Art. 8 Rome I Regulation; Directive 96/71 concerning the posting of workers in the framework of the provision of services, O.J. 1997, L 18/1; Saydé, op. cit. *supra* note 10, 391–393. For rather rare examples of studies bridging those doctrinal divides, see e.g. Van Hoek, op. cit. *supra* note 13; Verschueren, op. cit. *supra* note 17.

117. Art. 3(3) TEU.

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